Courts in the "Age of Reconciliation": *Office of Hawaiian Affairs v. HCDCH*

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I. THE OVERVIEW

To heal the persisting wounds of historic injustice,[1] governments, communities, and civil and human rights groups throughout the world are shaping redress initiatives around some form of reconciliation. Many of the initiatives are salutary.[2] All are fraught with challenges.

In Asia, Japan reluctantly faces continuing demands from victims of its World War II military atrocities.[3] Following the abolition of racial apartheid in South Africa, in order to rebuild the country, the new government-centered Truth and Reconciliation Commission pursued reconciliation between those perpetrating human rights violations and those badly harmed—a formal process

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[1] Eric K. Yamamoto & Ashley Obrey, *Reframing Redress: A "Social Healing Through Justice" Approach to Native Hawaiian-United States and Indigenous Ainu-Japan Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5 (2009).

[2] There are two prominent recent precursors to contemporary redress efforts. In Europe, German, French, and Swiss banks paid reparations to Holocaust survivors and their heirs for misappropriating assets of Jewish bank account holders during World War II. HOLOCAUST RESTITUTION (Michael Bazyler & Rodger P. Alford eds., 2006). In the United States, the President apologized to Japanese Americans wrongfully incarcerated during World War II, and Congress conferred $20,000 in individual reparations and established a program of public education. ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT (2d ed. forthcoming) (manuscript on file with authors) [hereinafter YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION].

[3] As recently as September 13, 2010, Japanese Foreign Minister Katsuya Okada apologized to former U.S. prisoners of war for their mistreatment and abuse at the hands of the Imperial Army during World War II. *See* Masami Ito, *Okada Apologizes for U.S. POWs' Treatment*, THE JAPAN TIMES, Sept. 14, 2010, *available at* http://search.japantimes.co.jp/cgi-bin/nn20100914a3.html; Kristl K. Ishikane, *Korean Sex Slaves' Unfinished Journey for Justice: Reparations from the Japanese Government for the Institutionalized Enslavement and Mass Military Rapes of Korean Women During World War II*, 29 U. HAW. L. REV. 123 (2005).

of truth-telling, confessions, amnesty and reparation.[4] Timor Leste's Parliament organized a similar commission[5] to address the atrocities by Indonesian soldiers during Indonesia's twenty-year occupation of East Timor,[6] with a focus on the sexual violence against East Timor women.[7] Indeed, in this "Age of Reconciliation,"[8] initiatives proliferate across the globe. Formal reconciliation projects mark the landscape in Peru,[9] Colombia,[10] Chile,[11] El Salvador,[12] Argentina,[13] Rwanda,[14] Cambodia,[15] and Sierra Leone.[16] And on

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[4] *See generally* Penelope E. Andrews, *Reparations for Apartheid's Victims: The Path to Reconciliation?*, 53 DEPAUL L. REV. 1155 (2004); Erin Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. MEM. L. REV. 367 (2003); Marianne Geula, *South Africa's Truth Reconciliation Commission as an Alternate Means of Addressing Transitional Government Conflicts in a Divided Society*, 18 B.U. INT'L L.J. 57 (2000); Tama Koss, Comment, *South Africa's Truth and Reconciliation Commission: A Model For the Future*, 14 FLA. J. INT'L L. 517 (2002); Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63 (1997); Eric K. Yamamoto & Susan K. Serrano, *Healing Racial Wounds? The Final Report of South Africa's Truth and Reconciliation Commission, in* WHEN SORRY ISN'T ENOUGH 492 (Roy Brooks ed., 1998); Eric K. Yamamoto, *Race Apologies*, 1 J. GENDER RACE & JUST. 4 (1997).

[5] The Commission is known as the Commission for Reception, Truth and Reconciliation in Timor-Leste or CAVR (the Portuguese acronym). *Post-CAVR Technical Secretariat*, CAVR, www.cavr-timorleste.org/en/index.htm (last visited Feb. 22, 2011).

[6] For a discussion of the reconciliation process in Timor Leste, formerly known as East Timor, see generally Cheah Wui Ling, *Forgiveness and Punishment in Post-Conflict Timor*, 10 UCLA J. INT'L L. & FOREIGN AFF. 297 (2005).

[7] *See* Galuh Wandita et al., *Learning to Engender Reparations in Timor-Leste: Reaching out to Female Victims, in* WHAT HAPPENED TO THE WOMEN?: GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS 284 (Ruth Rubio-Marín ed., 2006).

[8] Yamamoto & Obrey, *supra* note 1, at 32.

[9] *See generally* Lisa J. Laplante, *On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development*, 10 YALE HUM. RTS. & DEV. L.J. 141 (2007); Lisa J. Laplante, *The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru's Political Transition*, 23 AM. U. INT'L L. REV. 51 (2007).

[10] In 2006, Colombia's National Commission for Reparation and Reconciliation (CNRR) issued its Mission Statement explaining the goal of "healing the wounds" against the unique challenges of carrying out "a policy of truth, justice, and reparation in the middle of the conflict." National Commission for Reparation and Reconciliation—CNRR, Mission Statement (2006), *available at* http://www.cnrr.org.co/contenido/09i/spip.php?article7.

[11] Elizabeth Lira, *The Reparations Policy for Human Rights Violations in Chile, in* THE HANDBOOK OF REPARATIONS 55, 56 (Pablo De Greiff ed., 2006).

[12] Alexander Segovia, *The Reparations Proposals of the Truth Commissions in El Salvador and Haiti: A History of Noncompliance, in* THE HANDBOOK OF REPARATIONS, *supra* note 11, at 154, 156.

[13] Nunca Más (Never Again): Report of CONADEP (National Commission on the Disappearance of Persons) — 1984, *available at* http://www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain_001.htm.

[14] Timothy Gallimore, *The Legacy of the International Criminal Tribunal for Rwanda (ICTR) and its Contributions to Reconciliation in Rwanda*, 14 NEW ENG. J. INT'L & COMP. L.

foreign terrain, micro- or community-based reconciliation processes are gaining traction.[17]

In the United States, too, the federal and state governments, as well as various private organizations, are organizing reparatory justice efforts in a variety of settings—efforts that extend beyond singular payments of monetary compensation. African Americans are pursuing reparatory justice for slavery and Jim Crow segregation through lawsuits and lobbying state and local governments.[18] Mexican Americans filed a class action lawsuit and are now seeking legislative reparations and an apology from several states and the federal government for their coercive "deportation" of thousands of Mexican Americans and legal resident Mexican immigrants during the Great Depression in order to open jobs for white workers.[19] Japanese Latin Americans—abducted by the United States during World War II and held hostage in U.S. internment camps as bargaining chips with Japan—advocate for the same Presidential apology and reparations payments received by former Japanese

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239, 251 (2008).

[15] David Cohen, *"Hybrid" Justice in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects for the Future*, 43 STAN. J. INT'L L. 1, 27 (2007).

[16] *Id.* at 11. For a discussion of other reconciliation initiatives, see PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS (2011) (documenting forty truth commissions in operation from 1974 to 2009).

[17] Following the Indonesian occupation of East Timor, the government's Commission for Reception, Truth and Reconciliation established separate "Community Reconciliation Procedures" to enable villages to handle non-serious criminal and civil disputes. Patrick Burgess, *Community Reconciliation in East Timor: A Personal Perspective*, *in* PATHWAYS TO RECONCILIATION—BETWEEN THEORY AND PRACTICE 139, 143 (Philips Rothfield et al. eds., 2008). A presiding panel from a village comprised of local leaders from churches, women's groups, youth committees, and other groups heard testimony and, according to reconciliation principles, shaped acknowledgements and apologies and facilitated agreements on reparations payments and community service. *Id.* at 144. The community reconciliation process filled a vacuum, "providing the only contact with any process of justice for most people." *Id.* at 147.

[18] *See generally* Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811 (2006); Eric J. Miller, *Reconceiving Reparations: Multiple Strategies in the Reparations Debate*, 24 B.C. THIRD WORLD L.J. 45 (2004); Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279 (2003); Charles J. Ogletree, Jr., *Reparations for the Children of Slaves: Litigating the Issues*, 33 U. MEM. L. REV. 245 (2003); Charles J. Ogletree, Jr., *Tulsa Reparations: The Survivors' Story*, 24 B.C. THIRD WORLD L.J. 13 (2004); Robert Westley, *Many Billions Gone: Is It Time to Reconsider The Case for Black Reparations?*, 40 B.C. L. REV. 429 (1998); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477 (1998).

[19] Eric L. Ray, *Mexican Repatriation and the Possibility for a Federal Cause of Action: A Comparative Analysis on Reparations*, 37 U. MIAMI INTER-AM. L. REV. 171, 171 (2005); Wendy Koch, *U.S. Urged to Apologize for 1930s Deportations*, USA TODAY, Apr. 4, 2006, *available at* http://www.usatoday.com/news/nation/2006-04-04-1930s-deportees-cover_x.htm.

American internees.[20] Filipino World War II veterans who fought for the United States are seeking promised veterans' benefits some sixty-five years later.[21] Native Hawaiians[22] and Native Americans—two indigenous groups displaced from homelands, stripped of political power, and partially robbed of cultural identity—seek to reclaim land, restore self-governance, and rebuild culture through reconciliation initiatives with federal and state governments.[23] Private organizations are also engaged. The United Church of Christ Hawai'i Conference and its national counterpart undertook a multi-faceted four-year reconciliation process with Native Hawaiian churches and the larger Native Hawaiian community for the denomination's participation in the overthrow of the Hawaiian nation 100 years earlier.[24]

The stakes are high, both for those experiencing persisting harms and for society itself.[25] The wounds of injustice persist over time.[26]

> First, the harms of serious discrimination and violence are not isolated abstract ideas but are found in people's "lived experiences," grounded in their "everyday lives." Second, those experiences are not only "very painful and stressful in the immediate situation . . . but also have a cumulative impact on particular individuals, their families, and their communities." The harms of injustice are

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[20] *See* Natsu Taylor Saito, *Justice Held Hostage: U.S. Disregard For International Law in the World War II Internment of Japanese Peruvians—A Case Study*, 40 B.C. L. REV. 275 (1998); Eric K. Yamamoto, *Reluctant Redress: The United States' Kidnapping and Internment of Japanese Latin Americans*, *in* MARTHA MINOW, BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR 132, 136 (Nancy L. Rosenblum ed., 2003).

[21] *Filipino-American WWII Vets Seek Equal Benefits*, SF GATE, Feb. 21, 2011, *available at* http://articles.sfgate.com/2011-02-21/news/28617677_1_filipino-american-veterans-filipino-soldiers-speier; Oliver Teves, *Philippine WWII Veterans Seek Equality From US*, USA TODAY, Sept. 24, 2008, *available at* http://www.usatoday.com/news/world/2008-09-24-1315739951_x.htm.

[22] In this article, the term "Native Hawaiian" refers to "all persons descended from the Polynesians who lived in the Hawaiian Islands when Captain James Cook arrived in 1778." *See* JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? 1 n.1 (2008). The term "Kānaka Maoli" is also used to describe the indigenous people of Hawai'i. *See id.*

[23] *See* S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309 (1994); William C. Bradford, *"With a Very Great Blame on Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1 (2002-2003); Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS J. 47 (2008).

[24] ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT & RECONCILIATION IN POST-CIVIL RIGHTS AMERICA 61-71, 214-35 (1999) [hereinafter YAMAMOTO, INTERRACIAL JUSTICE].

[25] *See* JOE R. FEAGIN & MELVIN P. SIKES, LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE 16 (1994) (describing findings on the ways deeply embedded discrimination generates economic and psychological harms that carry across generations).

[26] Eric K. Yamamoto, Sandra Hye Yun Kim & Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 40 (2007).

"stored not only in individual memories but also in family stories and group recollections" over time.[27]

Indeed, experiences of injustice shape people's life perspectives. Those experiences "generate a picture of a fundamentally unjust society, where hard work and achieved status are inadequate protection against those with power and privilege."[28]

Efforts to heal injustice present numerous challenges. Both domestically and internationally, reconciliation initiatives encounter stubborn obstacles: political opposition, economic recession, government foot-dragging, and internal group dissension.[29] Aggrieved people criticize government apologies when reparatory action fails to follow words of contrition. Aborigines' anger at Australia's refusal to consider reparations after the government's apology to the "stolen generations" of children is but one example.[30] Indigenous peoples' frustration at Canada's delayed implementation of its reconciliation initiative to redress the forced assimilation of aboriginal children in abusive white residential schools is another.[31] Even reconciliation efforts that steadily progress face major hurdles.[32]

More specifically, and the focal point of this article: After a lengthy process that generates a multiparty reconciliation initiative, what happens when a government's unilateral action on key aspects of the initiative threatens to

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[27] *Id.* at 40 (quoting FEAGIN & SIKES, *supra* note 25, at 15-16). Professor Jonathan Osorio describes the historic injustice to Native Hawaiians as "a story of violence, in which that colonialism literally and figuratively dismembered the lāhui (the people) from their traditions, their lands, and ultimately their government. The mutilations were not physical only, but also psychological and spiritual." JONATHAN KAY KAMAKAWIWO'OLE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887, at 3 (2002).

[28] Yamamoto, Kim & Holden, *supra* note 26, at 40.

[29] *See generally* Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351 (2008); Eric K. Yamamoto & Brian Mackintosh, *Redress and the Salience of Economic Justice*, OXFORD FORUM ON PUBLIC POLICY, no. 4 (2010).

[30] *See* Tim Johnston, *Australia Apologizing to Aborigines*, N.Y. TIMES, Nov. 3, 2008, *available at* http://www.nytimes.com/2008/02/13/world/asia/13iht-13aborigine-copy.9995732.html. For a discussion of Australia's halting reconciliation initiative with its indigenous population, see Barbara Ann Hocking & Margaret Stephenson, *Why the Persistent Absence of a Foundational Principle?: Indigenous Australians, Proprietary and Family Reparations*, *in* REPARATIONS FOR INDIGENOUS PEOPLES 477, 477-522 (Federico Lenzerini ed., 2008).

[31] *See* Bradford W. Morse, *Indigenous Peoples of Canada and Their Efforts to Achieve True Reparations*, *in* REPARATIONS FOR INDIGENOUS PEOPLES, *supra* note 30, at 271, 275-76. *See also* Jennifer J. Llewellyn, *Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice*, 27 U. TORONTO L.J. 253 (2002).

[32] *See* Yamamoto & Mackintosh, *supra* note 29 (describing progress and obstacles in Peru's and South Africa's reconciliation initiatives).

undermine the government's reconciliation commitment? Is that simply political reality? Or might courts of law enforce the underpinnings of that commitment? Put another way: Is reconciliation merely new-age talk with no legal effect? Or when a legislature and an executive branch commit to reconciliation, will courts enforce key aspects of that commitment? The answer to the latter question is yes . . . under certain circumstances.

This is why Chief Justice Ronald Moon's[33] 2008 opinion in *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawaii* (*OHA v. HCDCH*)[34] is path-forging. That unanimous opinion[35] addresses what those circumstances might be and lays the groundwork for possible future enforcement of integral aspects of reconciliation commitments, including the State of Hawai'i's commitment to Native Hawaiians. In broader view, the pronouncements of the Hawai'i Supreme Court (the Court)[36] in *OHA v. HCDCH* underscore a government's—any government's—accountability for its public reconciliation promises.

Briefly stated, in *OHA v. HCDCH*, the State's high court cited the State's commitment to reconciliation with Native Hawaiians as a primary reason for imposing a freeze on the State's sale of former native lands now held in trust.[37] For the first time, a court in the United States imposed major legal consequences onto a government's reconciliation commitment.[38] In essence, the Hawai'i Supreme Court determined that the State cannot intone "reconciliation" to garner good graces and then, when politically convenient, undermine promised reparatory action. It identified the origins of the State's commitment—including the Hawai'i Constitution, multiple acts by the Hawai'i Legislature, and executive branch pronouncements—and cited these collective laws and pronouncements as a primary legal basis for enjoining the State's sale of trust lands until the State and Hawaiian peoples' representatives resolve Hawaiians' "unrelinquished claims" to those lands.[39] The Court's injunction

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[33] Chief Justice Moon served as Chief Justice of the Hawai'i Supreme Court from 1993 until he retired in August 2010. The current Chief Justice Mark Recktenwald succeeded Chief Justice Moon as head of the Hawai'i Supreme Court.

[34] Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw. (*OHA*), 117 Haw. 174, 177 P.3d 884 (2008), *rev'd sub nom.* Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436 (2009).

[35] Justice Steven Levinson, Justice Paula Nakayama, Justice Simeon Acoba, and Circuit Court Judge Derrick Chan (in place of Justice James Duffy) joined in the opinion.

[36] This article's usage of "Court" with a capital "C" as a short-hand reference to the Hawai'i Supreme Court is meant to elevate the state high court and the path-forging significance of its ruling for local, national, and international audiences. The few references to the U.S. Supreme Court in this article are clearly designated as such.

[37] *See OHA*, 117 Haw. at 192, 177 P.3d at 902.

[38] Research on Lexis and Westlaw revealed no other federal or state court decision.

[39] *See infra* Part IV.B.2. This part of the article draws from Brief for Equal Justice Society

did not settle these political claims. Rather, it preserved the object at the heart of one of those claims for political negotiations.

The Hawai'i Supreme Court grounded its decision in state and federal law, citing both the 1993 Congressional Apology Resolution (Apology Resolution)[40] and related state legislation.[41] Although the U.S. Supreme Court later reversed and vacated the Hawai'i court's ruling because of its reliance on federal law,[42] the U.S. Supreme Court left open the question of whether there were adequate state law grounds to enforce the State's reconciliation commitment.[43] As intimated in Chief Justice Moon's opinion, and as we elaborate below, independent and adequate state law grounds do support the Hawai'i Supreme Court's initial ruling.[44] The State, through its three branches of government and its voting citizenry, acknowledged the historic injustice and committed the State to reparatory justice through reconciliation,[45] including political negotiations over the return of ceded lands. The U.S. Supreme Court's reversal, therefore, does not undercut the import of the Moon opinion: a state's own commitment to reconciliation to redress the persistent harms of injustice creates, in some situations, legally enforceable obligations.

This is why the Hawai'i Supreme Court's opinion in *OHA v. HCDCH* is broadly significant—the opinion provides a conceptual and legal framework for those involved in redress initiatives in Hawai'i, the continental United States, and beyond. This is especially important given the reconciliation concept's ubiquity, elasticity, and susceptibility to shifting political and economic forces.[46]

To assist in our assessment of the *OHA v. HCDCH* opinion, we draw upon an analytical approach to reconciliation initiatives. That approach, developed by Professor Yamamoto, is *Social Healing Through Justice*.[47] It identifies

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et al. as Amici Curiae Supporting Respondents, Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436 (2009) (No. 07-1372), 2009 WL 247667.

[40] Joint Resolution To Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, and to Offer an Apology to Native Hawaiians on Behalf of the United States for the Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993) [hereinafter Apology Resolution].

[41] *See OHA*, 117 Haw. at 195, 177 P.3d at 905.

[42] Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436 (2009).

[43] *Id.* at 1445.

[44] *See infra* Part IV.B.2.

[45] *See infra* Part IV.B.2.

[46] Yamamoto & Obrey, *supra* note 1, at 30-37.

[47] This approach first emerged in Professor Yamamoto's book on interracial justice, which focused in part on a multidisciplinary approach to redressing historic injustice. *See* YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 24. This framework was updated and refined in two subsequent articles. *See* Yamamoto, Kim & Holden, *supra* note 26; Yamamoto & Obrey, *supra* note 1. Other scholars have advanced theories of reparations. *See, e.g.*, TAKING WRONGS SERIOUSLY: APOLOGIES AND RECONCILIATION (Elazar Barkan & Alexander Karn eds., 2006);

social healing as the deeper aim of most redress efforts in established democracies,[48] links words of healing to reparatory acts, and elaborates upon both the substance and process of reconciliation. The approach engages a redress framework embracing the "Four Rs" of *Social Healing Through Justice*: *recognition*, *responsibility*, *reconstruction*, and *reparation*. These Four Rs offer guides for both shaping and later assessing reconciliation initiatives.[49]

For this shaping and assessing, historical context matters. To provide that context for Chief Justice Moon's *OHA v. HCDCH* opinion, Part II of this article briefly describes the historical background for the litigation and court ruling. Part III analyzes the opinion itself, highlights the Hawai'i Supreme Court's identification of the State's commitment to reconciliation with Native Hawaiians, and explains events following the Court's decision. With *Social Healing Through Justice* in mind, Part IV examines the broader impact of the decision for reparatory initiatives here and abroad.

II. THE SETTING

A. Hawai'i's Indigenous People[50]

The State's commitment to reconciliation is rooted in Native Hawaiians' special connection to Hawaiian lands.[51] After King Kamehameha unified the

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ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS (2006); ALFRED L. BROPHY, REPARATIONS PRO AND CON (2006); JOHN DAWSON, HEALING AMERICA'S WOUNDS (1994); NICHOLAS TAVUCHIS, MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION (1993); POLITICS AND THE PAST (John Torpey ed., 2003). *See also* AMARTYA SEN, DEVELOPMENT AS FREEDOM (2000); Martha C. Nussbaum, Symposium, *Capabilities and Human Rights*, 66 FORDHAM L. REV. 273 (1997); Martha C. Nussbaum, *Human Rights and Human Capabilities*, 20 HARV. HUM. RTS. J. 21 (2007). For a more detailed discussion of reparations theory and practice, see Yamamoto, Kim & Holden, *supra* note 26, at 15-39.

[48] Yamamoto & Obrey, *supra* note 1, at 27.

[49] *Id.* at 33.

[50] This section provides a brief overview of the historical events that generated the impetus for reconciliation with Native Hawaiians. For more complete discussions, see TOM COFFMAN, NATION WITHIN: THE STORY OF AMERICA'S ANNEXATION OF THE NATION OF HAWAI'I (1998); MICHAEL DOUGHERTY, TO STEAL A KINGDOM: PROBING HAWAIIAN HISTORY (1992); LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEĀ LA E PONO AI? (1992); OSORIO, *supra* note 27; NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM (2004); and HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I (1999).

[51] Professor Lilikalā Kame'eleihiwa provided a succinct history of Native Hawaiians' special connection to the land to the Hawaii Advisory Committee to the U.S. Commission on Civil Rights:

From time immemorial, Native Hawaiians have had a special genealogical relationship to

islands, Native Hawaiians thrived on a unique communal land tenure system, a self-sustaining economy, a stable political order, and a sophisticated language, culture, and religion.[52] The Hawaiian principle of "caring for the land" organized and guided Hawaiian society.[53] At the time of English Captain Cook's contact with Hawai'i in 1778, the Native Hawaiian population flourished at around 800,000.[54]

Western contact triggered changes that permanently scarred this indigenous landscape. Foreign diseases decimated the Native Hawaiian population. Missionaries catalyzed the demise of traditional religion.[55] American businessmen pushed for the adoption of Western laws in ways that advanced their economic interests.[56] Internationally, Britain, France, and the United States valued Hawai'i for its strategic military locale.[57] King Kamehameha III addressed the threat of a foreign power takeover and the loss of Hawaiian land in part through the transformation of the Hawaiian Kingdom into a constitutional monarchy in 1840.[58]

> the Hawaiian islands. Born from the mating of Earth Mother Papa and Sky Father Wākea, we're the Hawaiian islands the Hawaiian people. That's the definition of native. We are from the land 100 generations ago. As such we have an ancient duty to love, cherish, and cultivate our beloved grandmother, the land. The study of stewardship is called mālama 'āina, where land is not for buying and selling, but for the privilege of living upon. And in the reciprocal relationship, when we Native Hawaiians care for and cultivate the land, she feeds and protects us.

Haw. Advisory Comm. to the U.S. Comm'n on Civil Rights, Reconciliation at a Crossroads: The Implications of the Apology Resolution and *Rice v. Cayetano* for Federal and State Programs Benefiting Native Hawaiians 27 (2001), *available at* http://www.usccr.gov/pubs/sac/hi0601/hawaii.pdf [hereinafter Hawaii Advisory Committee] (quoting Dr. Lilikalā Kame'elehiwa, Statement Before the Hawai'i Advisory Committee to the U.S. Commission on Civil Rights: The Impact of the Decision in *Rice v. Cayetano* on Entitlements 29-30 (Sept. 29, 2000) (transcript)).

[52] Apology Resolution, *supra* note 40, 107 Stat. 1510. For a discussion of the traditional land tenure system, see Melody K. MacKenzie, *Historical Background*, *in* NATIVE HAWAIIAN RIGHTS HANDBOOK 3, 3-6 (Melody K. MacKenzie ed., 1991) [hereinafter MacKenzie, *Historical Background*]; Davianna McGregor, *An Introduction to the Hoa'āina and Their Rights*, 1 HAWAIIAN J. HIST. 30 (1996); and VAN DYKE, *supra* note 22, at 11-18.

[53] *See generally* DAVIANNA POMAIKA'I MCGREGOR, NĀ KUA'ĀINA: LIVING HAWAIIAN CULTURE (2007); *see also* Mililani B. Trask, *Historical and Contemporary Hawaiian-Self Determination: A Native Hawaiian Perspective*, 8 ARIZ. J. INT'L & COMP. L. 77, 78 (1991).

[54] *See* KAME'ELEIHIWA, *supra* note 50, at 20.

[55] *See* VAN DYKE, *supra* note 22, at 21-22.

[56] MacKenzie, *Historical Background*, *supra* note 52, at 5-6 (describing the transition from the traditional Hawaiian land tenure system to one based on Western concepts of property law); *see also* NOEL J. KENT, HAWAI'I: ISLANDS UNDER THE INFLUENCE (1993).

[57] VAN DYKE, *supra* note 22, at 30.

[58] *Id.*

The King agreed to laws that he believed would secure Native Hawaiian control over much of Hawai'i's land in the event of a foreign invasion.[59] The 1848 Māhele (division) began the conversion of Hawai'i's indigenous communal land tenure system to a Western fee simple system for the express purpose of creating indigenous Hawaiian land ownership.[60] Three classes of individuals were entitled to land awards: the Mō'ī (king), the Ali'i (chiefs) and the maka'āinana (native tenants).[61] Kamehameha III divided the land he received into two parts—one part he retained for himself, which later became the Crown Lands; the other part he set aside as Government Lands for the benefit of his Kingdom's people.[62] Despite Kamehameha III's reservations about foreign landowners, American and former American businessmen later pressured the King to allow Westerners to acquire fee title. For a variety of economic and political reasons, within fifty years of the Māhele, former American missionaries and American-related businesses gained control over most of Hawai'i's non-Crown and non-Government Lands.[63]

The calculated efforts of Westerners to control the Hawaiian Islands also permeated the political sphere. Businessmen pushed King Kalākaua and the U.S. Congress to execute the 1875 Reciprocity Treaty that gave the United States military control over Pearl Harbor in exchange for eliminating U.S. tariffs on Hawai'i sugar and pineapple.[64] The Hawaiian League, a group of non-Hawaiian businessmen, then pressured Kalākaua into signing what is now called the "Bayonet Constitution."[65] The new constitution transferred much of the King's authority to these businessmen and disenfranchised the Hawaiian people.[66] Upon succeeding to the throne, Queen Lili'uokalani planned to scuttle the new constitution and return control to the monarchy.[67]

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[59] *See* JON J. CHINEN, THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1848, at 25 (1958) ("The king was deeply concerned over the hostile activities of the foreigners in the Islands. He did not want his lands to be considered public domain and subject to confiscation by a foreign power in the event of a conquest.").

[60] *See generally* KAME'ELEIHIWA, *supra* note 50 (describing the 1848 Māhele and the transformation of the communal land system to a privatized one). *See also* GAVAN DAWS, SHOAL OF TIME: A HISTORY OF THE HAWAIIAN ISLANDS 126 (1974). The King consented to the original Māhele conditioned upon the exclusion of foreign land ownership. *Id.*

[61] *See* VAN DYKE, *supra* note 22, at 40.

[62] *See id.* at 50-51.

[63] *See* MacKenzie, *Historical Background*, *supra* note 52, at 9-10; KAME'ELEIHIWA, *supra* note 50, at 298-306; VAN DYKE, *supra* note 22, at 51.

[64] *See* DEP'T OF THE INTERIOR & DEP'T OF JUSTICE, REPORT ON THE RECONCILIATION PROCESS BETWEEN THE FEDERAL GOVERNMENT AND NATIVE HAWAIIANS: FROM MAUKA TO MAKAI: THE RIVER OF JUSTICE MUST FLOW FREELY 23 (2000) (quoting H.R. EXEC. DOC. No. 1 at 39-41 (1894)).

[65] *See* OSORIO, *supra* note 27, at 238-41.

[66] *See id.* at 238-49; Trask, *supra* note 53, at 79; VAN DYKE, *supra* note 22, at 145-49.

[67] *See* VAN DYKE, *supra* note 22, at 151.

In 1893, however, backed by the U.S. military and diplomatic personnel, a small group of American and former American businessmen,[68] calling themselves the "Committee of Safety,"[69] overthrew the sovereign Hawaiian nation.[70] The ensuing provisional government established the Republic of Hawai'i in 1894, and the Republic claimed title to all Government and Crown Lands.[71] A contentious debate over U.S. annexation erupted. Then-U.S. President Grover Cleveland described the American-supported coup as "an Act of War" against an internationally-recognized sovereign and supported restoration of the Hawaiian nation.[72]

In 1896, newly-elected President William McKinley reversed course. As part of its colonial expansion in the Pacific in 1898, the United States annexed Hawai'i.[73] The annexation occurred "without the consent of or compensation to the indigenous people of Hawaii or their sovereign government who were thereby denied . . . their lands and ocean resources."[74] The Republic "ceded" the 1.75 million acres of former Government and Crown Lands to the United States.[75] Against the vehement protests of the former Queen and most of her constituents,[76] the United States acquired Hawai'i as a territory.

Sixty years of near-absolute Western control over Hawai'i's economy, politics, and social life ensued. The white "oligarchy,"[77] with support from Congress, the military, and presidential appointments, controlled the lands, the

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[68] COFFMAN, *supra* note 50; VAN DYKE, *supra* note 22, at 162.

[69] *See* DEP'T OF THE INTERIOR & DEP'T OF JUSTICE, *supra* note 64, at 26-27.

[70] *See, e.g.*, MacKenzie, *Historical Background*, *supra* note 52, at 10-12; VAN DYKE, *supra* note 22, at 151-71.

[71] MacKenzie, *Historical Background*, *supra* note 52, at 13. Queen Lili'uokalani was forced to abdicate her throne after the Republic of Hawai'i established itself. *Id.* While imprisoned in her own palace, the Queen lamented, "[i]t had not entered our hearts to believe that these friends and allies from the United States . . . would ever . . . seize our nation by the throat, and pass it over to an alien power." LILI'UOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN 368 (1898).

[72] GROVER CLEVELAND, PRESIDENT'S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, H.R. EXEC. DOC. No. 47, at VI (1893).

[73] For a discussion of the historical events leading up to Hawai'i's annexation, see COFFMAN, *supra* note 50.

[74] 42 U.S.C. § 11701(11) (2006). The vehicle of a Joint Resolution was apparently an invalid means of annexation. *See* U.S. CONST. art. II, § 2, cl. 2 (requiring a treaty and vote of Congress for annexation). Some therefore argue that Hawaiian sovereignty has never extinguished, and the United States is an occupying force. David Keanu Sai, The American Occupation of the Hawaiian Kingdom: Beginning the Transition from Occupied to Restored State (Dec. 2008) (unpublished Ph.D. dissertation, University of Hawai'i) (on file with authors).

[75] VAN DYKE, *supra* note 22, at 213.

[76] *See* SILVA, *supra* note 50, at 123-130.

[77] *See* FRANCINE DU PLESSIX GRAY, HAWAII: THE SUGAR-COATED FORTRESS (1972) (describing the oligarchy that controlled Hawai'i for the first half of the century).

economy, the ethnic make-up, and the politics of the islands.[78] The United States' colonization of Hawai'i tore at the fabric of Native Hawaiian life.[79] Indeed, by 1920, in creating the Hawaiian Homelands Program,[80] Congress designated Native Hawaiians "a dying race."[81]

The international trend toward decolonization[82] and the Democratic revolution in Hawai'i in the mid-20th century brought further change to the islands.

> The unionization of plantation and dockworkers and the return of Japanese Americans from World War II energized a growing Hawai'i Democratic Party. With an expanded Asian American political presence, the invigorated Democratic Party legislatively unseated the white Republican oligarchy that had controlled politics and the economy for sixty years. Democrats and Republicans, along with some Native Hawaiians, then pushed for statehood.[83]

The 1959 State Admission Act transferred a majority of ceded lands[84]—1.4 million acres of the 1.75 million acres—from the federal government to the State of Hawai'i in trust,[85] in part for "the betterment of the conditions of native Hawaiians."[86]

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[78] *See id.*

[79] *See generally* OSORIO, *supra* note 27. For statistics on Native Hawaiians' socio-economic status today, see Hawaii Advisory Committee, *supra* note 51, at 12-18.

[80] Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921).

[81] H.R. REP. NO. 66-839, at 2 (1920).

[82] The U.N. Charter in 1945 brought the principles of "equal rights and self-determination of peoples" to the forefront of international discourse. U.N. Charter art. 1, para. 2. General Assembly Resolution 1514, voted in favor by eighty-nine states and none against in 1960, stressed that "[i]mmediate steps shall be taken, in . . . Non-Self-Governing Territories . . . to transfer all powers to the peoples of those territories . . . in accordance with their freely expressed will and desire . . . in order for them to enjoy complete independence and freedom." Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), ¶ 5, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 at 66 (Dec. 14, 1960). Hawai'i had been on the United Nations' list of colonized territories eligible for independence until statehood. Despite the United Nations' preference for non-self-governing territories becoming independent, the plebiscite denied Hawaiians the option of voting for independence.

[83] YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION, *supra* note 2; *see generally* LAWRENCE H. FUCHS, HAWAII PONO: A SOCIAL HISTORY (1984); LAWRENCE H. FUCHS, HAWAII PONO: AN ETHNIC AND POLITICAL HISTORY (1997).

[84] Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959).

[85] VAN DYKE, *supra* note 22, at 257-58.

[86] Hawaii Admission Act, § 5(f), 73 Stat. at 5.

B. The Commitment to Reconciliation

From African American civil rights movements and indigenous peoples' human rights movements worldwide emerged a Hawaiian cultural renaissance and intense grassroots political organizing for the restoration of sovereignty and return of homelands. After years of education and agitation and with the support of key religious and political leaders,[87] the United States finally acknowledged the harms of American colonization. The extraordinary 1993 Apology Resolution[88] apologized for the United States' participation in the 1893 "illegal overthrow" [89] of the Hawaiian nation and committed the United States to reconciliation to repair the resulting devastation.[90]

In the Apology Resolution, Congress acknowledged that the Republic of Hawai'i ceded lands belonging to the Kingdom of Hawai'i "without the consent of or compensation to the Native Hawaiian people . . . or their sovereign government"[91] and that "the indigenous Hawaiian people never directly relinquished their claims . . . over their national lands to the United States."[92] Congress further acknowledged that "the health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land."[93] Congress then expressed its "commitment to acknowledge the ramifications of the overthrow . . . in order to provide a proper foundation for *reconciliation* between the United States and the Native Hawaiian people."[94] Paralleling Congress' actions, the State of Hawai'i endorsed what amounted to a reconciliation initiative that spanned all three branches of government and its voting populace.[95]

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[87] President William Clinton signed the Apology Resolution into law in November 1993. Apology Resolution, *supra* note 40, 107 Stat. 1510.

[88] *Id.*

[89] *Id.* "whereas" cl. 19, 107 Stat. at 1512.

[90] *Id.* § 1, 107 Stat. at 1513.

[91] *Id.* "whereas" cl. 25, 107 Stat. at 1512.

[92] *Id.* "whereas" cl. 29, 107 Stat. at 1512.

[93] *Id.* "whereas" cl. 32, 107 Stat. at 1512.

[94] *Id.* § 1, 107 Stat. at 1513 (emphasis added).

[95] *See infra* Parts III.A, IV.B.2.a.

C. The Litigation[96]

In 1994, the Housing Finance and Development Corporation (HFDC) and the State initiated the transfer of two parcels of ceded lands to private developers for residential housing.[97] This marked the first proposed transfer of ceded lands after the 1993 Apology Resolution and similar state legislation.[98] The Office of Hawaiian Affairs (OHA)[99] intervened in the sale and demanded a disclaimer from HFDC that preserved any future Hawaiian government claims to the ceded lands.[100] HFDC refused.[101]

OHA then filed suit against HFDC (later renamed the Housing and Community Development Corporation of Hawai'i (HCDCH)),[102] its board members, and the Governor to stop the transfer. Thereafter, Pia Thomas Aluli, Jonathan Kamakawiwo'ole Osorio, Charles Ka'ai'ai and Keoki Maka Kamaka Ki'ili also filed suit, and the state circuit court consolidated the two lawsuits.[103] Collectively, the plaintiffs sought to enjoin the State from selling the two specific parcels of ceded lands and any other ceded lands.[104]

The circuit court's opinion acknowledged the factual and historical bases for Native Hawaiian claims to ceded lands, as described earlier, but ultimately denied the request for injunctive relief. The court determined that jurisdictional and other defenses—including sovereign immunity, waiver and estoppel, and

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[96] This section is drawn substantially from an essay by Moanike'ala Crowell, published in the Ka He'e Summer 2008 newsletter of the Ka Huli Ao Center for Excellence in Native Hawaiian Law, William S. Richardson School of Law, University of Hawai'i. *See* Moanike'ala Crowell, *Ho'oholo I Mua—Towards Reconciliation? Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawai'i*, KA HE'E (Ka Huli Ao Ctr. for Excellence in Native Hawaiian Law, William S. Richardson Sch. of Law, Univ. of Haw.), Summer 2008, *available at* http://www2.hawaii.edu/~nhlawctr/article5-4.htm.

[97] Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw. (*OHA*), 117 Haw. 174, 180, 177 P.3d 884, 890 (2008).

[98] *See id.* at 187, 177 P.3d at 897.

[99] For a discussion of the Office of Hawaiian Affairs (OHA), see *infra* Part IV.B.2.a.

[100] *OHA*, 117 Haw. at 187, 177 P.3d at 897.

[101] The Court explained that "HFDC declined to honor OHA's requested disclaimer because 'to do so would place a cloud on [the] title, rendering title insurance unavailable to buyers in the Leali'i [sic] project.'" *Id.* (internal citations omitted in original).

[102] "In 1997, the legislature consolidated HFDC with the Hawai'i Housing Authority and the rental housing trust fund into the Housing and Community Development Corporation of Hawaii (HCDCH)." *Id.* at 187 n.9, 177 P.3d at 897 n.9.

[103] *See id.* at 188 n.12, 177 P.3d at 898 n.12.

[104] Alternatively, the plaintiffs sought either a declaration that the defendants were not permitted to sell or transfer ceded lands from the public land trust or, if the defendants prevailed, a declaration that transferring or selling ceded lands would not limit future claims by Native Hawaiians to those lands. *Id.* at 188, 177 P.3d at 898.

justiciability—barred the plaintiffs' claims.[105] The court also concluded that the State possessed the express authority to alienate ceded lands under the Admission Act, the Hawai'i State Constitution, and state legislation.[106] It adopted the reasoning of Attorney General Opinion 95-3[107] that "[t]he Admission Act § 5(f) expressly acknowledges that ceded or public lands may be alienated when it refers to 'the proceeds from the sale or other disposition of such lands.'"[108] From this executive branch opinion and the state constitutional provisions and ordinary trust law principles,[109] the court essentially determined that as long as the State used the proceeds from the disposition of ceded lands to further Native Hawaiian interests, one of the 5(f) trust purposes, the State would not breach its trust obligation.[110]

III. THE HAWAI'I SUPREME COURT AND A TIME OF RECKONING

A. The Court's 2008 OHA v. HCDCH *Opinion*

The Hawai'i Supreme Court vacated the circuit court judgment and remanded.[111] A unanimous Court determined that neither the cited statutory language nor ordinary property and trust law principles governed, and it ruled in favor of OHA and the four individual plaintiffs.[112] Chief Justice Moon's opinion for the Court recognized the historical basis for the plaintiffs' claims, citing to the U.S. Apology Resolution and state laws, and determined that the commitment to reconciliation with Native Hawaiians prevented the State from doing what it could otherwise legally do—sell trust lands for fair value and pay proceeds into the trust.

The Court found governmental commitments to reconciliation in both federal and state law. The Court construed the federal 1993 Apology Resolution to be more than a policy statement. In the Court's view, "Congress has clearly recognized that the native Hawaiian people have unrelinquished claims over the ceded lands, which were taken without consent or compensation and which the

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[105] *Id.* at 189, 177 P.3d at 899 (referencing opinion by then-Circuit Court Judge Sabrina McKenna).

[106] *See* Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw., Civ. No. 94-0-4207, slip op. at 89 (Haw. 1st Cir. Dec. 5, 2002).

[107] *Id.* at 82.

[108] *Id.* at 84 (quoting Op. Att'y Gen. 95-3 (1995)).

[109] *Id.* at 89.

[110] *Id.* at 92-94.

[111] Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw. (*OHA*), 117 Haw. 174, 218, 177 P.3d 884, 928 (2008), *rev'd sub nom.* Hawaii v. Office of Hawaiian Affairs, 129 S.Ct. 1439 (2009).

[112] The Hawai'i Supreme Court also disposed of each procedural and jurisdictional issue. *See id.* at 197-211, 177 P.3d at 907-21.

native Hawaiian people are determined to preserve, develop, and transmit to future generations."[113] The Court determined that the Apology Resolution did not itself require the State to restore the ceded lands to Native Hawaiians.[114] Rather, it contemplated a process of reconciliation between Native Hawaiians and the federal and state governments that encompassed those land claims.[115] As the Court highlighted, the Apology Resolution "serves as the *foundation* (or starting point) for reconciliation, including the future settlement of the plaintiffs' unrelinquished [land] claims."[116]

The Court bolstered its conclusion through an assessment of state law. It acknowledged that Hawai'i's people "clarified the State's trust obligation to native Hawaiians"[117] through ratification of the 1978 constitutional amendment that created OHA. As elaborated later in this article,[118] OHA's creation marked an important milestone for Native Hawaiian claims to self-governance and land restoration. Hawai'i's populace through its constitution had established a vehicle for reparatory action that for the first time "provide[d] for accountability, self-determination, [and] methods for self-sufficiency through assets and a land base."[119]

The Court also scrutinized related state legislation that echoed the federal Apology Resolution. As detailed later, according to the Court, the analogous state acts gave rise to the State's fiduciary duty to preserve the ceded lands pending political resolution of Native Hawaiian land claims.[120] The Court explained that "such duty is consistent with the State's obligation to use reasonable skill and care in managing the public lands trust" and that the State's conduct should be judged "by the most exacting fiduciary standards."[121]

Specifically, the Court pointed to Act 354 in which the Hawai'i Legislature acknowledged that many Native Hawaiians and others view the 1893 overthrow to have been an illegal act by the United States.[122] Act 354 also contemplated some form of land reparation—"*many native Hawaiians believe that the lands taken without their consent should be returned* and if not, *monetary reparations* made, and that they should have the right to sovereignty, or the right to self-determination and self-government as do other native American

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[113] *Id.* at 191, 177 P.3d at 901.

[114] *Id.* at 192, 177 P.3d at 902.

[115] *Id.*

[116] *Id.* (emphasis added).

[117] *Id.* at 182, 177 P.3d at 892.

[118] *See infra* Part IV.B.2.a.

[119] STANDING COMM. REP. NO. 59, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 644 (1980).

[120] *OHA*, 117 Haw. at 193, 177 P.3d at 903.

[121] *Id.* at 195, 177 P.3d at 905 (quoting Ahuna v. Dep't of Hawaiian Home Lands, 64 Haw. 327, 338, 640 P.2d 1161, 1169 (1982)).

[122] *Id.* at 193, 177 P.3d at 903.

peoples."[123] Additionally, Act 354 recognized the Legislature's "*continued support to the native Hawaiian community by taking steps to promote the restoration of the rights and dignity of native Hawaiians.*"[124] The Court also found that in Act 359, the Legislature made findings similar to those expressed in the Apology Resolution. That legislation, entitled "A Bill for an Act Relating to Hawaiian Sovereignty," acknowledged that "the indigenous people of Hawai'i were denied . . . their lands."[125]

Linking Native Hawaiian land claims to "lasting reconciliation," the Court quoted from Act 329. That Act clarified responsibility for management of public trust lands and observed that "*lasting reconciliation so desired by all people of Hawai'i is possible only if it fairly acknowledges the past while moving into Hawaii's future.*"[126] Equally significant, Act 340 acknowledged that "the island of Kaho'olawe is of significant cultural and historic importance to the native people of Hawai'i" and required that Kaho'olawe be held in trust and transferred to a sovereign Native Hawaiian entity in the future.[127]

With these laws in mind, the Hawai'i Supreme Court determined that the consolidated plaintiffs met the three-prong test for a permanent injunction.[128] The plaintiffs' legal claim was meritorious; the State's sale of ceded lands during the reconciliation process would irreparably harm Native Hawaiians, and the larger public interest in reconciliation supported the ban on the sale.[129] The Court therefore held that the State possessed a fiduciary duty to preserve the ceded lands as an integral part of the reconciliation process. In sum, the Court highlighted:

> (1) the cultural importance of the land to native Hawaiians, (2) that the ceded lands were illegally taken from the native Hawaiian monarchy, (3) that future *reconciliation* between the state and the native Hawaiian people is contemplated, and, (4) once any ceded lands are alienated from the public lands trust, they will be gone forever.[130]

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[123] *Id.* (first emphasis in original; second emphasis added).

[124] *Id.* (quoting Act of July 1, 1993, No. 354, § 1, 1993 Haw. Sess. Laws 999, 999-1000) (emphasis added).

[125] *Id.* (quoting Act of July 1, 1993, No. 359, § 1, 1993 Haw. Sess. Laws 1009, 1010).

[126] *Id.* at 194, 177 P.3d at 904 (emphasis in original) (quoting Act of July 1, 1997, No. 329, § 1, 1997 Haw. Sess. Laws 956, 956).

[127] *Id.* (quoting Act of June 30, 1993, No. 340, § 1, 1993 Haw. Sess. Laws 803, 803).

[128] The court determined that the appropriate test for a permanent injunction is: "(1) whether the plaintiff has prevailed on the merits; (2) whether the balance of irreparable damage favors the issuance of a permanent injunction; and (3) whether the public interest supports granting such an injunction." *Id.* at 212, 177 P.3d at 922.

[129] *Id.* at 218, 177 P.3d at 928.

[130] *Id.* at 213, 177 P.3d at 923 (emphasis added).

In particular, the Court emphasized that OHA and the Hawaiian claimants would suffer irreparable damage without injunctive relief—ceded lands would be "gone forever."[131] Monetary payments in lieu of the ceded lands would not suffice because of the intimate cultural and spiritual bond between Native Hawaiians and those lands.[132]

The Court also determined that an injunction would serve the public's interest in reconciliation, enabling the populace to "fairly acknowledge[] the past while moving into Hawaii's future."[133] The Court ended its opinion by quoting the Hawai'i Legislature—"lasting reconciliation [is] desired by all people of Hawaii."[134]

B. An Epilogue

Proponents of Native Hawaiian rights lauded the Hawai'i Supreme Court's unanimous decision. Celebration soon abated when then-Governor Linda Lingle's administration petitioned the U.S. Supreme Court for a writ of certiorari and the Court accepted review. After noting jurisdiction,[135] the U.S. Supreme Court reversed on the ground that the 1993 U.S. Apology Resolution itself did not provide a legal basis for enjoining the State from alienating ceded lands.[136] The Court, however, acknowledged that it did not have jurisdiction to

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[131] *Id.*

[132] *Id.* at 214-17, 177 P.3d at 924-27.

[133] Act of June 30, 1997, No. 329, § 1, 1997 Haw. Sess. Laws 956, 956.

[134] *OHA*, 117 Haw. at 216, 177 P.3d at 926 (quoting Act of June 30, 1997, No. 329, § 1).

[135] Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436, 1442-43 (2009). OHA and the other private plaintiffs in the suit argued that the case did not raise a federal question because the Hawai'i Supreme Court's decision rested on state law and urged the U.S. Supreme Court to dismiss for lack of jurisdiction. *Id.* at 1442. The U.S. Supreme Court explained that it has jurisdiction whenever "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Id.* at 1442 (quoting Michigan v. Long, 463 U.S. 1032, 1040-41 (1983)).

[136] *Id.* at 1445. The U.S. Supreme Court examined whether "the Apology Resolution strips Hawaii of its sovereign authority to sell, exchange, or transfer the lands that the United States held in absolute fee and granted to the State of Hawaii, effective upon its admission into the Union." *Id.* at 1443 (internal citations and alteration marks omitted). The U.S. Supreme Court examined the two substantive provisions of the Apology Resolution and concluded that they functioned as conciliatory statements. *Id.* at 1443-44. Turning its attention to the "whereas" clauses that preface the Apology Resolution, the Court rejected the Hawai'i Supreme Court's conclusion that they conclusively established Congress's recognition that the Native Hawaiian people have unrelinquished claims over ceded lands. *Id.* at 1444-45. Accordingly, the U.S. Supreme Court held that the substantive provisions and "whereas" clauses of the Apology Resolution as a matter of federal law did not strip the State of its sovereign authority to alienate ceded lands. *Id.* at 1445.

decide whether an adequate state law basis existed to enjoin the State from selling ceded lands.[137] The U.S. Supreme Court explained that it has "no authority to decide questions of Hawaiian [i.e., state] law or to provide redress for past wrongs except as provided for by federal law."[138]

After the U.S. Supreme Court decision, OHA, all but one of the private plaintiffs,[139] and the State of Hawai'i settled their contentious dispute.[140] Those parties agreed to dismiss the lawsuit without prejudice conditioned on the passage of special legislation[141] requiring a two-thirds majority vote by both legislative chambers before ceded lands could be sold or transferred.[142] The settlement agreement became effective when the 2009 Legislature passed Senate Bill 1677 and Governor Lingle signed it into law as Act 176.[143]

All parties, except plaintiff Jonathan Osorio, thereafter filed a joint motion seeking dismissal of the plaintiffs' appeal without prejudice, and the Hawai'i Supreme Court granted the motion.[144] The State also filed a motion to dismiss Osorio's appeal.[145] The Court held that Osorio had standing to sue and pursue an appeal but that his asserted claims were no longer "ripe" for adjudication because the Legislature, under Act 176, had not approved the sale of any ceded lands.[146] The fifteen-year legal dispute came to a close. OHA Chair Haunani Apoliona and Attorney General Mark Bennett expressed in a joint statement that "[w]e can now concentrate on working together on matters we all believe are crucially important to Hawaii."[147]

Yet, even with the legislation, many difficulties lay ahead for participants to the State-Hawaiian reconciliation initiative.

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[137] *Id.* at 1445.

[138] *Id.* The U.S. Supreme Court thereafter remanded the case for further proceedings not inconsistent with its opinion. *Id.*

[139] Plaintiff Jonathan Kamakawiwo'ole Osorio did not join the settlement agreement. Settlement Agreement, Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw., 117 Haw. 174, 177 P.3d 884 (2008).

[140] *Id.*

[141] The parties conditioned the settlement upon passage of S.B. No. 1677. *Id.*

[142] *Id.*

[143] Act of July 13, 2009, No. 176, 2009 Haw. Sess. Laws 705.

[144] Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw., 121 Haw. 324, 327 n.1, 219 P.3d 1111, 1114 n.1 (2009).

[145] *Id.* at 326, 219 P.3d at 1113.

[146] *Id.* at 339, 219 P.3d at 1126.

[147] Gordon Y.K. Pang, *State, OHA, 3 Plaintiffs Settle Ceded Lands Suit*, HONOLULU ADVERTISER, May 6, 2009, *available at* http://the.honoluluadvertiser.com/article/2009/May/06/ln/hawaii905060377.html.

IV. A LIMITED BUT SIGNIFICANT JUDICIAL ROLE IN THE RECONCILIATION PROCESS

A. A Social Healing Through Justice Approach to Reconciliation Initiatives

The Hawai'i Supreme Court's *OHA v. HCDCH* decision revealed the Court's clear-eyed grasp of the historic injustice and the centrality of ceded lands to the reconciliation process. But how do we assess the judiciary's role in the reconciliation process, particularly for Native Hawaiians and the people of Hawai'i, as well as for other reconciliation initiatives in the United States and beyond?

As mentioned, the *Social Healing Through Justice* framework is one approach for guiding and critiquing reconciliation initiatives.[148] It draws upon aspects of prophetic theology, social psychology, sociolegal studies, political theory, economics, indigenous healing practices,[149] and law.[150] From these diverse disciplines, the approach identifies four commonalities that inform the dynamics of the kind of justice that fosters healing for both harmed individuals and society itself.[151]

> The first is the embrace of the equivalent of the South African social idea of "ubuntu": all are members of the polity, and injury to one harms the entire community; therefore healing the injured is the responsibility of all. The second is that repair must occur in two realms simultaneously—the individual (micro) and the institutional (macro). Participation in the process must be widespread, and all must see a benefit. The third commonality is that there must be material change in the socioeconomic conditions underlying reconstructed group relationships—otherwise, the dangers of "empty apologies," "all words and no action," "false grace," or a "failure of reconciliation."[152]

Distilling these insights, the fourth commonality is reflected in a redress framework that accounts for integral stages of or dimensions to genuine reconciliation. This redress framework encompasses the "Four Rs" of *Social*

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[148] YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 24, at 172-209; Yamamoto & Obrey, *supra* note 1, at 28-37.

[149] One of the indigenous healing practices drawn upon is ho'oponopono. *See* E. VICTORIA SHOOK, HO'OPONOPONO: CONTEMPORARY USES OF A HAWAIIAN PROBLEM-SOLVING PROCESS (1985).

[150] YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 24, at 154-67 (discussing in depth these disciplines' insights on group healing).

[151] Yamamoto & Obrey, *supra* note 1, at 33.

[152] *Id.* at 32 (internal citations omitted).

Healing Through Justice: *recognition*, *responsibility*, *reconstruction*, and *reparations*.[153]

The first R, *recognition*, encompasses acknowledgement of persisting socioeconomic and psychological injuries.[154] It involves understanding how individuals, because of their group identity, continue to suffer pain, anger, shame, or material deprivation from historical injustice.[155] The *recognition* dimension also involves sociolegal inquiry. It prompts everyone to scrutinize the historical roots for the present-day conflicts and to decode stock stories embodying cultural stereotypes that seemingly legitimated the injustice.[156] Finally, the *recognition* dimension examines institutional barriers to egalitarian relationships—the organizational structures that embody discriminatory policies or denials of self-determination.[157]

The next R, *responsibility*, entails an assessment of wrongdoing and the acceptance of responsibility for resulting harms.[158] The inquiry examines the ways in which those with power over the aggrieved group may have abused their power and excluded others from full participation in the polity.[159] An acceptance of responsibility for healing is not limited to those who directly inflicted the harm, but may extend to others who were complicit in or who benefitted from the subjugation—all with an eye toward repairing the damage and building the community anew.[160]

The *recognition* of grievances and acceptance of *responsibility* for initiating the reparatory process are key starting points. But something more is needed to heal deep-seated wounds. That something is addressed by the third, and performative, R: *reconstruction*.[161] This dimension to social healing focuses on building a new productive relationship through apologies, forgiveness, and a reallocation of political and economic power.[162] It entails restructuring the institutions (including laws) that triggered the injustice.

Encompassing more than mere payments of money, the fourth R, *reparations*, also includes restitution, rehabilitation, community restructuring,

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[153] *Id.* at 33.

[154] For a complete discussion of what recognition entails, see YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 24, at 175-85.

[155] Yamamoto & Obrey, *supra* note 1, at 33; YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 24, at 175-85. *See also* Jonathan R. Cohen, *Coping With Lasting Social Injustice*, 13 WASH. & LEE J. CIV. RTS. & SOC. JUST. 259, 273 (2007).

[156] Yamamoto & Obrey, *supra* note 1, at 33.

[157] *See* YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 24, at 184.

[158] *Id.* at 185.

[159] *Id.*

[160] *Id.* at 189.

[161] *Id.* at 190.

[162] Yamamoto & Obrey, *supra* note 1, at 34.

and political education.[163] The general aim of reparations, then, is to proactively repair the significant multi-faceted damage.[164] Depending on the harms, reparations may include "the restoration of property, rebuilding of culture, economic development, and medical, legal, or . . . financial support for individuals and communities in need."[165]

The first two Rs, *recognition* and *responsibility*, entail words, often in the form of acknowledgments, apologies, and commitments. The latter two Rs, *reconstruction* and *reparations*, entail actions that fulfill verbal commitments and foster comprehensive sustained healing. When government and groups endeavor to craft a reconciliation initiative, inquiries into *recognition*, *responsibility*, *reconstruction*, and *reparations* illuminate the kind of justice that is likely to foster long-term social healing.[166]

The Four Rs also reveal why reconciliation initiatives sometimes struggle. Even if governments engage the first two Rs, recognition and responsibility, action in the form of reconstruction and reparations does not always follow. Common refrains emerge—governments plead financial incapacity or simply fail to make acting on redress promises a priority.[167] Or, in the case of Governor Lingle's administration, the executive may be supportive of several aspects of reconciliation[168] but decide that the state's other interests take precedence over the particular matter at hand.

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[163] *Id.* *See also* Pablo De Greiff, *Justice and Reparations*, *in* THE HANDBOOK OF REPARATIONS, *supra* note 11, at 451, 452-53.

[164] De Greiff, *supra* note 163, at 455. Scholars advocate reparations programs that focus on the specific needs and desires of those harmed. *See* Carlton Waterhouse, *The Good, the Bad, and the Ugly: Moral Agency and the Role of Victims in Reparation Programs*, 31 U. PA. J. INT'L L. 257 (2009).

[165] Yamamoto & Obrey, *supra* note 1, at 35.

[166] *See* Bradford, *supra* note 23 (applying the Four Rs to Native American reparations); Carla D. Pratt, *Tribes and Tribulations: Beyond Sovereign Immunity and Toward Reparation and Reconciliation for the Estelusti*, 11 WASH. & LEE RACE & ETHNIC ANC. L.J. 61 (2005) (employing the Four Rs for assessing treatment of Black Native Americans); Rebecca Tsosie, *Engaging the Spirit of Racial Healing Within Critical Race Theory: An Exercise in Transformative Thought*, 11 MICH. J. RACE & L. 21 (2005) (integrating Four Rs analysis into assessments of Native American and Native Hawaiian justice) .

[167] *See* Yamamoto & Mackintosh, *supra* note 29, at 3.

[168] Governor Lingle's administration initially provided strong support for the congressional Akaka Bill. The bill attempted to "establish[] a process within the framework of federal law for Native Hawaiians to reorganize a governing body to engage in a government-to-government relationship with the United States." Press Release, Senator Daniel Akaka, Native Hawaiian Recognition Bill Introduced (July 20, 2000), *available at* http://akaka.senate.gov/press-releases.cfm?method=releases.view&id=fa21e3d4-aa7e-4dc3-a223-9c66a7906a2d. Governor Lingle wrote to a Republican Senator: "It is a very simple matter of justice and fairness that Native Hawaiians receive the same treatment that America's other indigenous people enjoy." Gordon Y.K. Pang, *Lingle Lobbies for Akaka Bill*, HONOLULU ADVERTISER, May 18, 2006, *available at* http://the.honoluluadvertiser.com/article/2006/May/18/ln/FP605180329.html.

In this light, *OHA v. HCDCH* highlights a limited but nevertheless significant executive recalcitrance in the reconciliation realm and underscores the need for targeted accountability. In the big picture, it is about the Hawai'i Supreme Court's willingness to enforce key action-oriented aspects of the government's reconciliation commitment to ensure that reconciliation efforts are more than words alone.

B. A Court's Limited Though Significant Role in the Reconciliation Process

OHA v. HCDCH thus lays a foundation for reconciliation participants who seek to preserve for ultimate political resolution the crucial aspects of a government's and citizenry's commitments. The case demonstrates how a court, under certain conditions, plays a limited but nevertheless integral role in legitimizing and fostering a meaningful reconciliation process. As elaborated below, in appropriate circumstances a court can engage in a two-step process of first identifying a commitment to reconciliation that is embedded in law, and then enforcing key aspects of that commitment in order to ensure that the process proceeds productively. In these situations, the court aids reconciliation initiatives by preventing promises of redress by the executive or legislature from becoming dishonored commitments.

1. Political question?

At the threshold, the issue arises whether even a limited judicial role in a reconciliation process moves a court into the realm of non-justiciable political questions, thereby transgressing the proper separation of powers. The U.S. Supreme Court's six-factor test for determining non-justiciable political questions provides guidance.[169] The Hawai'i Supreme Court in *OHA v.*

Revisions to the Akaka Bill led Governor Lingle to temporarily withhold support, but after additional revisions, the Governor reaffirmed her support. *See* Derrick De Pledge, *Lingle Backs Akaka Bill Changes*, HONOLULU STAR-ADVERTISER, July 8, 2010, *available at* http://www.staradvertiser.com/news/20100708_Lingle_backs_Akaka_Bill_changes.html.

[169] *See* Baker v. Carr, 369 U.S. 186, 216 (1962). The Hawai'i Supreme Court adopted the *Baker* six-factor test in *Trustees of Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 737 P.2d 446 (1987). The standard for a political question is the presence of one of the following six factors: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility for deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Id.* at 455 (quoting *Baker*, 369 U.S. at 217) (format altered).

HCDCH applied the test and determined that the political question doctrine did not foreclose the plaintiffs' claims.[170] The Hawai'i Supreme Court drew a crucial distinction: "[T]he plaintiffs are not seeking a judicial resolution of the underlying claim for a return of lands, but are rather asking the judiciary to protect the trust assets while the dispute is being resolved [(in the reconciliation process)] by the political branches."[171] The Court recognized that what type of governance relationship is proper (i.e., the State's relationship to a forthcoming sovereign or quasi-sovereign Hawaiian government), and what reparations are adequate (i.e., the amount of money and land returned), are political questions ultimately to be negotiated by the Native Hawaiian entity, the state government, and the people of Hawai'i. A court does not participate in these political negotiations or determine their outcome (i.e., whether Native Hawaiians are entitled to ceded lands or to which lands they are entitled). Instead, the court in essence acts as a legal referee to ensure that the reconciliation process proceeds faithfully.

2. A two-step process

a. Identifying a commitment embedded in law

How does the two-step process work practically? Initially, a court assesses whether a government has made a commitment to reconciliation. This means identifying governmental promises grounded in law to repair the long-standing damage of historic injustice. Words that acknowledge wrongdoing and related harms and promise repair comprise the first two Rs: *recognition* and *responsibility.* A court thus inquires into the existence of a reconciliation commitment through language in the constitution and pronouncements by the legislature and executive.

As a guiding example, the Hawai'i Supreme Court identified the State of Hawai'i's reconciliation commitment to mutually resolve Native Hawaiian people's claims to ceded lands in various realms of state law: the Hawai'i State Constitution, multiple statutes, and executive pronouncements.[172] The Court recognized that Hawai'i's people ratified a 1978 state constitutional amendment creating OHA.[173] Tasked with administering ceded lands trust

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[170] Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw. (*OHA*), 117 Haw. 174, 210, 177 P.3d 884, 920 (2008), *rev'd sub nom.* Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436 (2009).

[171] *Id.* (internal brackets omitted).

[172] The following discussion is drawn with permission from Brief for Equal Justice Society et al. as Amici Curiae Supporting Respondents, *supra* note 39.

[173] *OHA*, 117 Haw. at 182, 177 P.3d at 892.

resources for the betterment of Native Hawaiians,[174] OHA marked a step toward Hawaiian self-governance.[175] It also represented much more. OHA embodied the State's *recognition* of Native Hawaiians' loss of self-governance and its corresponding *responsibility* for beginning to repair the damage of colonization.[176] By supporting this new semi-autonomous government agency, Hawai'i's citizenry embraced collective *responsibility* for affording Hawai'i's indigenous peoples a measure of self-determination.

The 1978 Constitutional Convention delegates expressly recognized the historic injustices and determined that it was "well past time" for the State to "meet the obligation that we have to do justice" for the Native Hawaiian people.[177] Anticipating self-government and reparations as part of the reparatory justice process, the Convention's Committee on Hawaiian Affairs described OHA's function as a "receptacle for any funds, land or other resources earmarked for or belonging to native Hawaiians."[178] OHA would be the vehicle that "provide[d] for accountability, self-determination, [and] methods for self-sufficiency through assets and a land base."[179] OHA would have "the power to accept the transfer of reparations moneys and land."[180]

Equally significant, the Hawai'i Supreme Court highlighted the Legislature's recognition of past injustices and the acceptance of responsibility for repair.[181] The Court acknowledged that after the adoption of the 1978 Constitutional Amendment creating OHA, the Hawai'i Legislature enacted enabling legislation.[182] Act 196 reaffirmed the State's "solemn trust obligation and responsibility to [N]ative Hawaiians."[183] Envisioning future redress, as did the

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[174] *See* HAW. CONST. art. XII, §§ 5-6; HAW. REV. STAT. § 10-3(6) (2009).

[175] *See* Melody K. MacKenzie, *Self-Determination and Self-Governance*, *in* NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 52, at 77, 89.

[176] *See* Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747, 1766-67 (2000) (describing the struggle over collective memory of an injustice as a predicate to recognizing the harms and need for repair).

[177] DEBATES IN COMM. OF THE WHOLE ON HAWAIIAN AFFAIRS, COMM. PROPOSAL NO. 13, *in* 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 460 (1980) (statement of Delegate Barr). *See also id.* at 457, 458 ("[T]he Hawaiians had become . . . landless" and the creation of OHA would "address the modern-day problems of Hawaiians which are rooted in as dark and sad a history as will ever mark the annals of time." (statement of Delegate De Soto)).

[178] STANDING COMM. REP. NO. 59, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 644 (1980).

[179] *Id.* at 646.

[180] *Id.* at 645.

[181] *See* Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw. (*OHA*), 117 Haw. 174, 182, 177 P.3d 884, 892 (2008), *rev'd sub nom.* Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1439 (2009).

[182] *See id.*

[183] Act of June 7, 1979, No. 196, § 2, 1979 Haw. Sess. Laws 398, 399.

Constitutional Convention delegates, the Act expressly identified one of OHA's primary functions as serving "as a receptacle for reparations."[184]

Subsequent legislation embraced the language of reconciliation and crystallized the State's commitment. Specifically, the Court pointed to Acts 354, 359, 329, and 340,[185] which acknowledged the long-standing harms to the Hawaiian community and the State's commitment to repairing the damage. Emphasizing the State's *recognition* of harms and commitment to *reconstructing* relationships and *repairing* the damage, the Court quoted from Act 354: "The [Hawai'i] legislature has also *acknowledged* that the actions by the United States were illegal and immoral, and *pledges its continued support* to the native Hawaiian community by *taking steps to promote the restoration* of the rights and dignity of native Hawaiians."[186] Additionally, the Court recognized that the Legislature in Act 359 "made findings similar to those expressed in the Apology Resolution,"[187] detailed in the Act's purpose to "facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing."[188] Act 329 also provided the Court with compelling evidence of the State's commitment to "*permanent reconciliation*" with Native Hawaiians in order to achieve a "*comprehensive, just, and lasting resolution.*"[189] As highlighted by the Court, "*[t]he legislature recognizes that the lasting reconciliation so desired by all people of Hawai'i is possible only if it fairly acknowledges the past while moving into Hawaii's future.*"[190]

Kaho'olawe[191] legislation indicated that verbal commitments about recognition and responsibility would materialize into reparatory action. Act 340 dictated that "the State shall transfer management and control of the island and its waters to the sovereign native Hawaiian entity upon its recognition by

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[184] HAW. REV. STAT. § 10-3(6) (2009).

[185] *OHA*, 117 Haw. at 193, 177 P.3d at 903.

[186] *Id.* (quoting Act of July 1, 1993, No. 354, § 1, 1993 Haw. Sess. Laws 999, 1000) (emphasis added).

[187] *Id.* (quoting Act of July 1, 1993, No. 359, §§ 1-2, 1993 Haw. Sess. Laws 1009, 1009-11).

[188] *Id.* (quoting Act of July 1, 1993, No. 359, § 2, 1993 Haw. Sess. Laws at 1010).

[189] *Id.* at 194, 177 P.3d at 904 (quoting Act of June 30, 1997, No. 329, § 1, 1997 Haw. Sess. Laws 956, 956) (emphasis added).

[190] *Id.* (quoting Act of June 30, 1997, No. 329, § 1, 1997 Haw. Sess. Laws at 956) (emphasis added).

[191] Kaho'olawe is one of the eight main islands in the Hawaiian Islands. Despite the spiritual and cultural significance of the island to Native Hawaiians, the federal government used the island for U.S. military training operations. Senator Daniel Inouye of Hawai'i obtained federal appropriations to repair the damage caused by the U.S. Navy's bombing. The State created the Kaho'olawe Island Reserve Commission to manage the Kaho'olawe Island Reserve while it is held in trust for a future sovereign Native Hawaiian entity. *See* KAHO'OLAWE ISLAND RESERVE COMMISSION, http://kahoolawe.hawaii.gov/home.php (last visited Mar. 2, 2011).

the United States and the State of Hawai'i."[192] Significantly, the legislation referred to *reconstruction* of government relationships with Native Hawaiians and to *reparation* in the form of land restoration.

This confluence of legislation persuaded the Court that the State made a commitment to reconciliation with Native Hawaiians—a commitment that encompassed future negotiations over issues of self-governance and return of land. Commitments made by Hawai'i's executive branch further bolstered the Court's assessments. Former Governor Lingle, in her 2003 State of the State Address, pledged: "Here at home in Hawai'i[,] I will continue to work with [the legislators] and with the Hawaiian community to resolve the ceded lands issue once and for all."[193] Governor Lingle's words echoed similar commitments made by previous governors.[194]

As identified by the Court, the State's commitment to reconciliation is rooted in the state constitution, detailed legislation, and executive pronouncements. In this initial step, then, a court's role is to identify when the political branches have made a commitment to reconcile.

b. Enforcing key aspects of the reconciliation commitment

The second step, in limited fashion, helps transform words of *recognition* and *responsibility* into reparatory action. After identifying a commitment to reconciliation that promises *reconstruction* and *reparation*, the court, under certain conditions, carefully enforces key aspects of those promises in ways that are consistent with the goal of the initiative.[195] More specifically, the court inquires into whether it is necessary for the government to take appropriate action on key aspects of the reconciliation commitment in order to ensure the process proceeds productively. Some aspects of the reconciliation process are necessarily fluid and depend on external circumstances. But not all. The court's role is to identify and preserve the key pieces that are integral to the reconciliation process.

How does the court know when to intercede? Inquiry into appropriate acts of *reconstruction* and *reparation* that transform verbal commitments into concrete actions provides guidance.

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[192] *OHA*, 117 Haw. at 194, 177 P.3d at 904 (quoting Act of June 30, 1993, No. 340, § 2, 1992 Haw. Sess. Laws 803, 806).

[193] *Id.* at 213, 177 P.3d at 923 (quoting Governor Linda Lingle, State of Haw., *State of the State Address: An Outline of the Governor's Agenda* (Jan. 21, 2003)).

[194] *See* Benjamin J. Cayetano, *The Next Four Years: Completing the Vision*, HONOLULU ADVERTISER, Oct. 16, 1998, at A13.

[195] Yamamoto & Obrey, *supra* note 1, at 7 (identifying the dual goals of reconciliation as healing the injured and healing society).

In *OHA v. HCDCH*, the Hawai'i Supreme Court determined that the State's commitment to reconciliation included negotiation over the return of land and some form of self-governance.[196] The Court then identified the central role that ceded lands, now held in trust, play in the reconciliation process.[197]

The *reconstruction* inquiry illuminates why ceded lands are integral aspects of the reconciliation commitment. Reconstruction entails fundamental restructuring of relationships and a reallocation of power.[198] Grounds exist under international law[199] for restructuring State-Hawaiian relations, as well as U.S.-Hawaiian relations, according to principles of self-determination.[200] These principles are enshrined in a plethora of international human rights instruments.[201] In particular, the United Nations Declaration of the Rights of Indigenous Peoples,[202] to which the United States pledged support in 2010,[203] acknowledges indigenous peoples' right to self-determination.[204] Under the Declaration, indigenous peoples have the "right to autonomy or self-government in matters relating to their internal and local affairs"[205] and the

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[196] *See OHA*, 117 Haw. at 212-14, 177 P.3d at 922-24.

[197] *See id.* at 213-17, 177 P.3d at 923-27.

[198] Yamamoto & Obrey, *supra* note 1, at 34; YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 24, at 190-91.

[199] The Hawai'i Supreme Court "recognize[d] that international law and situations cited by the plaintiffs provide support for their requested injunction" but reserved discussion because the Court found adequate state and federal laws to support its holding. *OHA*, 117 Haw. at 211 n.25, 177 P.3d at 921 n.25.

[200] *See, e.g.*, Anaya, *supra* note 23, at 330-31; Elena Cirkovic, *Self-Determination and Indigenous Peoples in International Law*, 31 AM. INDIAN L. REV. 375, 381 (2007); Trask, *supra* note 53, at 90-95; Jon M. Van Dyke, Carmen Di Amore-Siah & Gerald W. Berkley-Coats, *Self-Determination for Nonself-Governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawaii*, 18 U. HAW. L. REV. 623 (1996).

[201] *See* U.N. Charter art. 1 para. 2, art. 55; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Mar. 23, 1966); International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966); Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), para. 2, U.N. GAOR, 15th Sess., Supp. No. 16 at 66, U.N. Doc. A/4684 (Dec. 14, 1960); Declaration on Principles of International Law Concerning the Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (Oct. 24, 1970).

[202] United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), *available at* http://www.un.org/esa/socdev/unpfii/en/drip.html [hereinafter Declaration on the Rights of Indigenous Peoples].

[203] Krissah Thompson, *U.S. Will Sign U.N. Declaration on Rights of Native People, Obama Tells Tribes*, WASH. POST, Dec. 16, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/12/16/AR2010121603136.html.

[204] Declaration on the Rights of Indigenous Peoples, *supra* note 202, at art. 3.

[205] *Id.* at art. 4. The United Nations Declaration on the Rights of Indigenous Peoples evidences the international community's aspirations to support and protect the rights of

"right to maintain and strengthen their distinct political, legal, economic, social, and cultural institutions."[206]

More concretely, as the Hawai'i Supreme Court acknowledged, Native Hawaiians and the state and federal governments are in the process of attempting to restructure their relationship through controversial federal legislation commonly referred to as the "Akaka Bill."[207] The Court observed that the purpose of the Akaka Bill "is to authorize a process for the reorganization of a [n]ative Hawaiian government and to provide for the recognition of [a] [n]ative Hawaiian government by the United States for the purpose of carrying on a government-to-government relationship."[208] The Court explained that the Akaka Bill "provides that the federal government is authorized to negotiate with the State and the reorganized [n]ative Hawaiian government for a transfer of land and resources to a [n]ative Hawaiian government."[209] The bill would formally recognize the Native Hawaiians as indigenous people and set in motion a negotiating process for pursuing land claims with the State.[210] The legislation, if enacted, would therefore *restructure* the relationship between the State and Native Hawaiians.[211]

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indigenous peoples.

[206] *Id.* at art. 5.

[207] *See* Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw. (*OHA*), 117 Haw. 174, 182, 177 P.3d 884, 892 (2008), *rev'd sub nom.* Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1439 (2009). For a discussion on the Akaka Bill, see Le'a Malia Kanehe, *The Akaka Bill: The Native Hawaiians' Race for Federal Recognition*, 23 U. HAW. L. REV. 857 (2001); R. Hōkūlei Lindsey, *Akaka Bill: Native Hawaiians, Legal Realities, and Politics as Usual*, 24 U. HAW. L. REV. 693 (2002); and VAN DYKE, *supra* note 22, at 270-72.

[208] *OHA*, 117 Haw. at 182 n.7, 177 P.3d at 892 n.7 (quoting S. REP. NO. 107-66, at 1 (2001)).

[209] *Id.* at 182, 177 P.3d at 892. The Akaka Bill has garnered support and opposition from Hawaiian and non-Hawaiian groups. Proponents view the bill as part of restructuring the relationship between Native Hawaiians and the state and federal government. Opponents claim that the bill is merely a "racial preference" and is therefore illegal. Other opponents charge that the bill does not reach far enough and that the U.S. Department of Interior's control over the "self-governance" process undermines genuine self-determination. *See* Richard Borreca, *Hopes Dim for Akaka Bill Vote*, HONOLULU STAR-BULLETIN, July 21, 2005, *available at* http://archives.starbulletin.com/2005/07/21/news/index2.html; Bruce Fein, Op-Ed., *Senator Made Several Mistakes in Conception of Race-based Bill*, HONOLULU STAR-BULLETIN, Aug. 7, 2005, *available at* http://archives.starbulletin.com/2005/08/07/editorial/special.html; Boyd P. Mossman, Op-Ed., *Hawaiians Deserve Recognition Like Other Indigenous Groups*, HONOLULU STAR-BULLETIN, Aug. 7, 2005, *available at* http://archives.starbulletin.com/2005/08/07/editorial/special.html.

[210] *See* VAN DYKE, *supra* note 22, at 270-72 (explaining the Akaka Bill).

[211] On July 6, 2011, Governor Abercrombie signed into law Senate Bill 1520 as Act 195. Chad Blair, *'First step' to a Native Hawaiian Governing Entity*, HONOLULU CIVIL BEAT, July 6, 2011, *available at* http://www.civilbeat.com/articles/2011/07/06/12000-first-step-to-a-native-hawaiian-governing-entity/. Patterned generally on the Akaka Bill, the Act aims to reconstruct

Underscoring the importance of preserving ceded lands as a focal point for *restructuring* this relationship, the Court observed that expert David H. Getches highlighted that "what is special about these claims is that this is land that has a pedigree tracing back to a disposition of the Hawaiian people at the time of the overthrow."[212] When asked whether a political entity can govern without territory, Getches explained that "[i]t is very difficult to have sovereignty without land."[213]

The Court's inquiry into Native Hawaiians' historical connection to land revealed that ceded lands also play a fundamental role in meaningful acts of *reparation*. As the Court recognized, loss of homeland contributes to Native Hawaiians' present-day grievances. Highlighting the special relationship between Native Hawaiians and the land, or 'āina,[214] the Court's opinion included an eloquent statement by the trial court:

> *'Aina is a living and vital part of the [n]ative Hawaiian cosmology, and is irreplaceable.* The natural elements—land, air, water, ocean—are interconnected and interdependent. *To [n]ative Hawaiians, land is not a commodity; it is the foundation of their cultural and spiritual identity as Hawaiians.* The 'aina is part of their 'ohana, and they care for it as they do for other members of their families. For them, the land and the natural environment is alive, respected, treasured, praised, and even worshiped.[215]

This language underscores why the return of some portion of ceded lands to a representative Hawaiian entity is a key aspect of the reconciliation initiative. According to Hawaiian kūpuna, land is not merely a limited resource; it is intimately connected to Native Hawaiians' cultural and spiritual identity as a group.[216] It is integral to their long-standing injury. Return of some portion of the ceded lands—the original Crown and Government lands—works to *repair* the damage of historical injustice. As the Court's holding acknowledged,

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the State-Native Hawaiian political relationship. Act of July 6, 2011, No. 195, § 1, 2011 Haw. Sess. Laws 646, 648 ("The purpose of this Act is to recognize Native Hawaiians as the only indigenous, aboriginal, maoli population of Hawaii. It is also the state's desire to support the continuing development of a reorganized Native Hawaiian governing entity and, ultimately, the federal recognition of Native Hawaiians."). With reconciliation as a primary purpose, the Act strives to facilitate Native Hawaiian organization of a self-governing entity. *Id.*

[212] *OHA*, 117 Haw. at 214, 177 P.3d at 924.

[213] *Id.* at 214, 177 P.3d at 925.

[214] Melody K. MacKenzie, Susan K. Serrano & Koalani L. Kaulukukui, *Environmental Justice for Indigenous Hawaiians: Reclaiming Land and Resources*, 21 NAT. RESOURCES & ENV'T 37, 37 (2007); *see also* Eric K. Yamamoto & Jen-L W. Lyman, *Racializing Environmental Justice*, 72 U. COLO. L. REV. 311 (2001).

[215] *OHA*, 117 Haw. at 214, 177 P.3d at 924 (footnotes omitted in original) (some emphases in original and some emphases removed). The trial court's statement drew upon the expert testimony of Professor Davianna McGregor.

[216] *See* MCGREGOR, *supra* note 53; KAME'ELEIHIWA, *supra* note 50.

reducing reparations to monetary payments would undermine the reconciliation process. It would disregard the cultural and spiritual salience of the ceded lands.[217] Monetary reparations would not suffice as a logical remedy.

The *reconstruction* and *reparation* inquiries thus guide a court in facilitating the transformation of redress promises into concrete actions. The Hawai'i Supreme Court cautioned that "without an injunction, any ceded lands alienated from the public lands trust will be lost and will not be available for the future reconciliation efforts contemplated by . . . Acts 354, 359, and 329, and Governor Lingle."[218] Given the State's recognition of Native Hawaiians' unrelinquished claims to ceded lands and desire for self-governance, "any further diminishment of the ceded lands (the 'aina) from the public lands trust will negatively impact the contemplated reconciliation/settlement efforts between native Hawaiians and the State."[219] The Court therefore preserved that integral part of the government's commitment to reconciliation with Native Hawaiians.

Assessed through the lens of *Social Healing Through Justice*, *OHA v. HCDCH* thus illuminates the two-step process for determining when the judiciary can and should intercede, in essence, to act as a legal referee to ensure that the reconciliation process proceeds faithfully.

3. Going forward: A state law basis for reconciliation

Going forward, key questions remain for Native Hawaiians and the State as they endeavor to repair the "devastating" damage.[220] What will be the form of Native Hawaiian self-governance? What land will be returned? The Hawai'i Supreme Court in *OHA v. HCDCH* acknowledged that its role is not to resolve those questions.[221] The answers will be negotiated through the political process.[222]

The Court clearly conveyed, however, its assessment that there exists an adequate basis in state law for the state courts to enforce key aspects of the

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[217] Scholars have recognized the inappropriateness and inadequacy of reducing reparations to monetary payments. *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (providing seminal scholarship on reparations for Native Hawaiians); *see also* BROOKS, *supra* note 47; BROPHY, *supra* note 47.

[218] *OHA*, 117 Haw. at 214, 177 P.3d at 924.

[219] *Id.* at 216, 177 P.3d at 926.

[220] *See* Hawaii Advisory Committee, *supra* note 51, at 12-18.

[221] *See OHA*, 117 Haw. at 213, 177 P.3d at 923 ("For present purposes, this court need not speculate as to what a future settlement might entail—*i.e.*, whether such settlement would involve monetary payment, transfer of lands, ceded or otherwise, a combination of money and land, or the creation of a sovereign Hawaiian nation; it is enough that Congress, the legislature, and the governor have all expressed their desire to reach such a settlement.").

[222] *See id.*

reconciliation commitment.[223] Although the U.S. Supreme Court vacated the original Hawai'i Supreme Court decision because of its reliance on federal law, the U.S. high court left the door open for the Hawai'i Supreme Court to reinscribe its state law-based reconciliation analysis in future cases.

V. CONCLUDING THOUGHTS: RIPPLE EFFECTS

The Hawai'i Supreme Court's transformative decision in *OHA v. HCDCH* shows that a commitment to reparatory justice may be more than rhetoric. In some situations, it has real legal consequences with significant cultural and institutional impacts. Implicit in the Court's holding is the notion that there are certain aspects of a reconciliation initiative that are so fundamental to the process that promises of action on those aspects are enforceable by courts of law. Thus, if the political branches and affected groups engage in a struggle to address the historic injustice and mutually commit to a process of reconciliation, including reparatory action, then the government's commitment embraces more than words. The commitment carries limited, but nevertheless significant, legal obligations.[224] For the State of Hawai'i, at a minimum, those legal obligations encompass the preservation of ceded lands held in trust until Native Hawaiian claims to those lands are politically negotiated as an integral part of the reconciliation process.

Chief Justice Moon's *OHA v. HCDCH* opinion, then, illuminates one possible way to construct a multi-faceted reconciliation initiative. If government, organizations, and communities shape a reconciliation initiative by identifying claims to special land or cultural resources and commit through law to negotiate over those claims,[225] then the government (or organizations) cannot subvert that commitment by selling or destroying the targeted land or cultural resources before faithfully completing negotiations. If the government (or organizations) attempts to do so, the judiciary is empowered to intercede in limited fashion through its equitable powers[226] to preserve that land or resources throughout the reconciliation process.

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[223] *See supra* Part IV.B.2.a.

[224] *See supra* Part IV.B.2.b.

[225] Whether the special land or other resources must be the res of a formal trust, generating traditional trustee duties, or need only be designated by policymakers to be an integral part of the reconciliation process is a question to be resolved as it arises in concrete cases.

[226] A court's equitable powers are employed to assure fairness and justice where the court's powers at law (mainly in the form of monetary compensation) are inadequate. *See* Fleming v. Napili Kai, Ltd., 50 Haw. 66, 70, 430 P.2d 316, 319 (1967) ("We hold the court of equity has plenary power to mold its decrees in such form as to conserve the equities of all parties." (quoting Baker Sand & Gravel Co. v. Rogers P. & H. Co., 154 So. 591, 597 (Ala. 1934))); 27A Am. Jur. 2d *Equity* § 2 (2008) ("[E]quity's purpose is to promote and achieve justice and do so with some degree of flexibility.").

OHA v. HCDCH thus stands, if not as a beacon, then as a guiding light for some reconciliation initiatives. The rubble-strewn roads to reconciliation in the United States and worldwide pose many challenges, particularly where promises to repair damages of historic injustice are followed by sluggish reparatory action. Indeed, a common concern confronting all redress participants is how to transform promises of repair into concrete action. Peru and South Africa, for example, engaged reconciliation initiatives that *recognized* widespread human rights violations and accepted *responsibility* for remediating them. They also embraced comprehensive plans for repair. Those initiatives, though, fell short of genuine social healing because of a lack of comprehensive and systemic reparatory action—including economic justice[227]—in the form of bottom-up economic development (*reconstruction*) and individual payments (*reparations*) to those aggrieved.[228] Similar "obstacles plague reconciliation initiatives across the globe, from Sierra Leone to Chile and from Sri Lanka to Bosnia."[229]

People suffering the persisting harms of historic injustice in Hawai'i, the continental United States, and other countries seek, and deserve, more than "cheap grace"—all words and no action.[230] Often promised much, they frequently receive little. But sometimes governments and the populace deliver the kind of multi-faceted justice that heals.[231] Against these stark realities, the *Social Healing Through Justice* framework for shaping and assessing reconciliation initiatives illuminates the salience of Chief Justice Moon's *OHA v. HCDCH* opinion and its potential ripple effects in this "Age of Reconciliation." That opinion charts a potential collaborative path for the people, the legislature, the executive branch, and, yes, the courts in fostering genuine reconciliation—so that all in the polity might work together productively and live together peacefully. We all have a stake in social healing through justice.

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[227] EMMA COLEMAN JORDAN & ANGELA P. HARRIS, ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS 1167, 1174 (2005); EMMA COLEMAN JORDAN & ANGELA P. HARRIS, WHEN MARKETS FAIL: RACE AND ECONOMICS 489-91 (2006); *see also* HAYNER, *supra* note 16; SEN, *supra* note 47.

[228] *See* Yamamoto & Mackintosh, *supra* note 29. *See also* Ángel Páez, *No Right Reparations Yet for Families of Civil War Victims*, INTERPRESS SERVICE (July 27, 2010), http://ipsnews.net/news.asp?idnews=52284.

[229] YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION, *supra* note 2.

[230] YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 24, at 194-95.

[231] *See* YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION, *supra* note 2.